88-1255

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS; NATURAL RESOURCES DEFENSE COUNCIL, INC.; *et al.*,
Petitioners,

v.

JAMES M. LOVE, *et al.*,

DAVID FROHNMAYER, Attorney General for the State of Oregon,

and

JOHN A. MOORE, Acting Administrator, United States Environmental Protection Agency
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Does Section 6(c) of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136d(c)(2), create jurisdiction in the district courts to enjoin an emergency suspension of a pesticide by the Environmental Protection Agency after available administrative proceedings to consider the propriety of the suspension were waived? *

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* The defendant-appellant in the court of appeals (and a nominal respondent in this Court) was Lee M. Thomas, Administrator, United States Environmental Protection Agency. Mr. Thomas has now been replaced as Administrator by Acting Administrator John A. Moore. Defendants-intervenors in the court of appeals, (now petitioners in this Court) were American Federation of Labor and Congress of Industrial Organizations; Natural Resources Defense Council, Inc.; United Farmworkers of Washington States; Pineros Y Campesinos Unidos Del Noroeste, Inc.; Christina Esquivel; Diana Guzman; Alicia Prieto; Aurora Leon; Zenaida Prieto; Maria Esquivel; Constancio Martinez; Juan Prietom Jr.; Enrique Prieto; and Antonio Leon. Plaintiffs-appellees in the court of appeals (and respondents in this Court) were James M. Love; Northwest Food Processors Association; and Tualatin Valley Fruit Marketing, Inc. Plaintiff/intervenor-appellee in the court of appeals (and now respondent) was Dave Frohnmayer, Attorney General for the State of Oregon, on behalf of the people of the State of Oregon.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), the Natural Resources Defense Council, Inc. ("NRDC"), *et al.*, defendant-intervenors in this case, petition this Court to issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the judgment in *Love v. Thomas*, 838 F.2d 1059 (9th Cir. 1988).

OPINIONS BELOW

The District Court opinion in this case is reported at 668 F.Supp. 1443 and is reprinted at pp. 47a to 65a of the separately bound Appendix to this *certiorari* petition ("App. 47a-65a"). The Ninth Circuit opinion and judgment is reported at 838 F.2d 1059 and is reprinted at App. 1a-41a. The order amending the opinion and denying petitioner's and respondent Moore's petition for Rehearing and Suggestions for Rehearing *En Banc* is unreported, and is reprinted at App. 42a-44a.

JURISDICTION

The amended opinion and judgment of the United States Court of Appeals for the Ninth Circuit were issued on September 28, 1988. On the same day, the petition for rehearing and suggestion for rehearing *en banc* of the respondent Environmental Protection Agency ("EPA") Administrator[1] and petitioners' suggestion for rehearing *en banc* were denied. On December 21, 1988 Justice O'Connor signed an order extending the time for filing a petition of certiorari to and including January 26, 1989. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 6(c) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), as amended, 7 U.S.C. § 136d(c), provides:

> (1) *Order* If the Administrator determines that action is necessary to prevent an imminent hazard during the time required for cancellation or change in classification proceedings, he may, by order, suspend the registration of the pesticide immediately. No order of suspension may be issued unless the

[1] From the time this case was filed until it was finally decided by the Ninth Circuit, the EPA Administrator was Lee Thomas. At present, there is an acting EPA Administrator, John A. Moore.

Administrator has issued or at the same time issues notice of his intention to cancel the registration or change the classification of the pesticide.

Except as provided in paragraph (3), the Administrator shall notify the registrant prior to issuing any suspension order. Such notice shall include findings pertaining to the question of "imminent hazard". The registrant shall then have an opportunity in accordance with the provisions of paragraph (2), for an expedited hearing before the Agency on the question of whether an imminent hazard exists.

(2) *Expedited hearing* If no request for a hearing is submitted to the Agency within five days of the registrant's receipt of the notification provided for by paragraph (1), the suspension order may be issued and shall take effect and shall not be reviewable by a court. If a hearing is requested, it shall commence within five days of the receipt of the request for such hearing unless the registrant and the Agency agree that it shall commence at a later time. The hearing shall be held in accordance with the provisions of subchapter II of chapter 5 of Title 5, except that the presiding officer need not be a certified administrative law judge. The presiding officer shall have ten days from the conclusion of the presentation of evidence to submit recommended findings and conclusions of the Administrator, who shall then have seven days to render a final order on the issue of suspension.

(3) *Emergency order* Whenever the Administrator determines that an emergency exists that does not permit him to hold a hearing before suspending, he may issue a suspension order in advance of notification to the registrant. In that case, paragraph (2) shall apply except that (i) the order of suspension shall be in effect pending the expeditious completion of the remedies provided by that paragraph and the issuance of a final order on suspension, and (ii) no party other than the registrant and the Agency shall participate except that any person ad-

versely affected may file briefs within the time allotted by the Agency's rules. Any person so filing briefs shall be considered a party to such proceeding for the purposes of section 136n(b) of this title.

(4) *Judicial review* A final order on the question of suspension following a hearing shall be reviewable in accordance with section 136n of this title, notwithstanding the fact that any related cancellation proceedings have not been completed. Any order of suspension entered prior to a hearing before the Administrator shall be subject to immediate review in an action by the registrant or other interested person with the concurrence of the registrant in an appropriate district court, solely to determine whether the order of suspension was arbitrary, capricious or an abuse of discretion, or whether the order was issued in accordance with the procedures established by law. The effect of any order of the court will be only to stay the effectiveness of the suspension order, pending the Administrator's final decision with respect to cancellation or change in classification. This action may be maintained simultaneously with any administrative review proceeding under this section. The commencement of proceedings under this paragraph shall not operate as a stay of order, unless ordered by the court.

STATEMENT OF THE CASE

I. THE FACTS

EPA became concerned about the health risks posed by the pesticide dinoseb in the spring of 1986, following submission to the agency of new scientific studies concerning the safety of the chemical. *See* Decision and Emergency Order Suspending the Registrations of all Pesticide Products Containing Dinoseb, 51 F.Reg. 36,634, 36,635 (EPA Oct. 14, 1986) (hereafter "Emergency Order"); *see also* Notice of Intent to Cancel and Deny all Registrations for Pesticides Products Containing Dinoseb, 51 Fed. Reg. 36650, 36657-8 (EPA Oct. 14,

1986) hereafter "Notice of Intent to Cancel"). On October 7, 1986, EPA issued an emergency order requiring an imediate cessation of the use, transfer, and sales of the product, pending full consideration in administrative proceedings concerning whether, given dinoseb's risks and benefits, the registration of all pesticides containing dinoseb should be permanently cancelled.

The emergency suspension order was based upon detailed administrative findings, relying upon several scientific studies, recited in 16 densely packed pages of the Federal Register. The EPA Administrator's conclusion was that dinoseb presents "an imminent hazard" to human health so serious as to constitute a public health "emergency." In particular, the Administrator found that continued use of dinoseb even for a limited period posed grave risks of adverse reproductive effects for both males and females exposed to the products.[2]

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[2] More specifically, in his October 7, 1986 Emergency Order, the Administrator concluded that dinoseb is (1) a developmental toxin resulting in brain and spinal deformities in the fetus; (2) a reproductive toxin resulting in wasting or degeneration of the testes, decreased sperm counts and production of abnormal sperm cells in males and decreased fetal viability in their mates, including spontaneous abortions, miscarriages and stillbirths; (3) a male sterilent; (4) a potential human carcinogen; (5) a cause of blindness through cataracts and adverse affects on the immune system. *See* Emergency Order, 51 Fed. Reg. at 36636-38. The Administrator also concluded that "women of childbearing age who handle dinoseb and who wear the required state of the art protective farm equipment will still receive sufficient exposure to have no effective protection against potential dinoseb-induced birth defects" and that "no adequate means exist to warn or prohibit pregnant females from being in the proximity of farms that use dinoseb." *Id.* at 36643 and 36648. Finally the suspension order concluded that "virtually all workers directly involved in the application of dinoseb products have an inadequate margin-of-safety" and "spray drift, reentry and secondary exposure to residues on equipment or clothing may pose a substantial risk of inducing birth defects." *Id.* at 36635, 36643.

Following issuance of this emergency order, the Administrator determined, based upon additional data submitted by one registrant,

Only four of the more than three hundred dinoseb manufacturers and other registrants contested the suspension order by requesting a hearing on that order pursuant to § 6(c)(2) of FIFRA; all four then jointly withdrew their request ten days later. The statute provides that ordinarily, if no request for a hearing is submitted within five days of notice of a suspension order, "the suspension . . . shall not be reviewable by a court." FIFRA § 6(c)(2), 7 U.S.C. § 136(c)(2).

II. THE PROCEEDINGS IN THE DISTRICT COURT

Nonethelesss, the following year, on April 3, 1987, certain non-registrant users of dinoseb in Washington, Oregon, and Idaho went into district court seeking relief from the EPA's suspension order with regard to a few crops. App. 7a.[3] Twelve days later, the district court asserted jurisdiction on the basis of § 6(c)(4) of FIFRA, allowing "immediate review" of a suspension order issued "prior to a hearing before the Administrator." Following a two day trial *de novo* on the Administrator's determination that dinoseb presents an imminent hazard to human health, that court issued a preliminary injunction against the enforcement of the agency's emergency order pending completion of the EPA's cancellation proceeding.

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that the risks posed by dinoseb are actually considerably *more* severe than initially believed. *See* Respondent Administrator's Motion for Expedited Review or Partial Stay Pending Appeal in 9th Circuit, Appendix E. Specifically, the Director of the EPA Office of Pesticide Programs described the post-suspension studies this way: "The startling results in this new study indicate that the low or non-existent margins-of-safety of persons applying dinoseb previously calculated by the agency were overestimated by a factor of at least three. . .". ["U]se of dinoseb would produce a serious and unacceptable hazard to human health." *Id.* at 4.

[3] As non-registrants, these users of dinoseb had no right to request an administrative hearing on the propriety of the suspension. FIFRA § 6(c)(1), 7 U.S.C. § 136(c)(1).

The district court "did not question the scientific merit of EPA's decision" and held that "[a]ll the evidence substantiating the risks of use of dinoseb appeared to be well-founded." App. 58a. That court, rather, faulted EPA for the manner in which the agency determined the likely economic impact of the suspension of dinoseb on the growers of the crops involved in this case. App. 59a.

Having characterized EPA's emergency order as "arbitrary," the district court issued an injunction permitting the use of dinoseb if twelve prescribed conditions were followed. App. 69a-71a.[4] These included, *inter alia*, a requirement that "women of childbearing age, i.e., under the age of 45, may not be involved in mixing, loading, or any aspect of dinoseb application." App. 70a. On May 1, 1987, without any further hearing, the district court entered a final judgment and issued a permanent injunction. App. 47a.

III. THE PROCEEDINGS IN THE COURT OF APPEALS

On May 29, 1987, the present petitioners filed a motion to intervene in this proceeding, intending both to support EPA's position on the case and to challenge the portion of the district court's injunction excluding women from employment where the pesticide was used.[5] The Ninth Circuit granted the motion to intervene, and granted as well EPA's motion to expedite consideration of the case.

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[4] Under a separate petition for reconsideration of the suspension order filed by growers in Idaho and Washington, the Administrator had previously modified his suspension of dinoseb to allow its use on three crops under limited circumstances. The district judge incorporated many of these conditions in his injunction.

[5] Petitioners contended that such an exclusion, when imposed by a governmental entity, violates both the Constitution and FIFRA; where use of pesticide is harmful to the reproductive health of women, the appropriate response, petitioners maintained, is to ban the pesticide, not the women workers.

After argument, a divided court upheld both the district court's assertion of jurisdiction and the conclusion that EPA's emergency suspension was arbitrary.[6] In finding jurisdiction, Judge Kozinski, writing for the majority, held that while judicial review of an ordinary suspension order would have been foreclosed once the statutory administrative hearing had been waived, the district court nonetheless had jurisdiction to review the agency's initial emergency order under the "immediate review" provision of FIFRA § 6(c)(4) many months after the opportunity for an administrative hearing on the underlying suspension of the pesticide had come and gone. App. 15a.

In dissent, Judge Norris characterized the majority opinion as sanctioning "a remarkably tortured and hypertechnical reading of the statute." App. 38a. Judge Norris went on:

> [T]he majority suggests no reason why Congress would make a distinction between the judicial reviewability of ordinary and emergency suspension orders. I suggest none exist. . . . It simply defies common sense that an ordinary suspension order becomes final and unreviewable in the absence of a timely request for a hearing but an emergency order remains open and reviewable indefinitely. . . . Judicial review of an emergency suspension order is

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[6] This petition raises only the jurisdictional question decided below. The reason is not that we concur with the court of appeals' conclusion that the Agency acted arbitrarily, which we decidedly do not, but that, as limited by its amended opinion (App. 43a-44a), the merits decision is largely fact-specific, and therefore does not call for this Court's exercise of its certiorari authority. The jurisdiction issue, on the other hand, raises a generic question likely to have a serious impact upon EPA in dealing with later pesticide emergencies and therefore *does* merit this Court's immediate attention.

> thus available under section 6(c)(4) only in the period of time after an expedited hearing has been requested but before the Administrator renders a final order on the issue of suspension, normally a matter of a few weeks. . . . [App. 39a].

Judge Norris concluded:

> The bottom line in this case shows the majority's reading of the statute is bizarre. Contrary to the clear intent of Congress, which has written a statute which speaks in terms of suspension order becoming final in *five days* if no registrant requests expedited hearing, the majority allows non-registrants to seek judicial review of an emergency suspension order *seven months* after it becomes final by the terms of this statute. The district court clearly lacked jurisdiction to review the emergency suspension order. [App. 41a] [7]

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[7] At the time the Ninth Circuit opinion issued, only two dinoseb registrants, the Cedar Chemical Company and Drexel Chemical Company, were still contesting the final cancellation of the product before the agency. Those two companies, then entered into a settlement agreement with the Administrator providing for the final cancellation of their registration. The Agency agreed that existing stocks of certain dinoseb products could be sold and distributed for use for the 1988 and 1989 growing seasons. The Administrative Law Judge hearing the dinoseb cancellation approved the settlement and, on June 10, 1988, the Administrator issued a final decision and order in the dinoseb cancellation proceeding. *See, In the Matter of Cedar Chemical Company, et al., v. U.S. Environmental Protection Agency*, FIFRA Docket Nos. 590, *et al.*, Cancellation Order and EPA Rationale for Settlement.

Three days later, on June 13, 1988, the Administrator filed in the Ninth Circuit a motion to vacate the judgments in this case, on the grounds of mootness. This motion was predicated on the supposition that the final cancellation order superceded the Administrator's suspension at issue here. Subsequent to the Administrator's motion, however, the same district court that ruled in this case again interceded: New actions were filed by some of the plaintiffs in the present case and others, challenging the settlement reached with the remaining dinoseb registrants. *See Northwest Food Processors Association, et al. v. Thomas*, Civ. No. 88-641-RE

REASONS FOR GRANTING THE WRIT

This litigation concerns the power of the EPA Administrator to act swiftly and effectively when the Agency determines that continued use of a particular pesticide would create an "imminent hazard" to public health so extreme as to constitute an "emergency." In

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(D. Ore.) On June 17, 1988, the district court granted a preliminary injunction staying the Administrator's cancellation decision, notwithstanding the fact that all registrants had now acquiesced in dinoseb's cancellation.

On August 1, 1988, the Ninth Circuit issued an order requiring all parties to address the issue of whether "the District Court's order of June 17, 1988, staying the Administrator's cancellation order of June 9, 1988, has rendered the order a nullity for purposes of mootness." Intervenors AFL-CIO, NRDC et al. as well as Appellees Northwest Food Processors Association, et al., submitted memoranda urging that the case was not moot. Likewise, on August 5, 1988, the Administrator requested that its motion regarding mootness be "held in abeyance pending final action concerning the dinoseb cancellation in *Northwest Food Processors v. Thomas*, Civ. No. 88-641-RE. (D. Oregon)." Appellant's Reply to Response to Motion to Vacate the Judgments, Dismiss the Complaint and Issue the Mandate Forthwith on the Grounds of Mootness at 7. On September 19, 1988, the Ninth Circuit denied the Administrator's motion to vacate on the grounds of mootness. App. 45a.

The long and tortured progress of this litigation over dinoseb then continued. On October 4, 1988, the district court held that it was without jurisdiction to review the Administrator's final cancellation order since such review power was instead vested in the court of appeals. *Northwest Food Processors, et al. v. Thomas, supra,* (Order Granting Summary Judgment). The Northwest Food Processors Association, et al., then filed a Notice of Appeal (9th Cir. No. 88-4339), and some of the petitioners herein, having been granted intervention to challenge the provision of the Administrator's cancellation order allowing dinoseb's existing stocks to be utilized, filed a timely cross appeal. (*Alvarez et al. v. Thomas,* 9th Cir. No. 88-4389). The Northwest Food Processors Association has also filed an original proceeding in the Ninth Circuit to challenge the Administrator's final cancellation order. *Northwest Food Processors v. Thomas* (9th Cir. No. 7216). These matters have now all been consolidated for briefing and oral argument before the Ninth Circuit, currently scheduled for the first week in March.

particular, the case involves the issue of when, and under what circumstances, the district courts may enjoin such an EPA order, where, because of the public health emergency presented, the order of suspension was initially entered temporarily, pending an opportunity for an administrative hearing.

The Ninth Circuit held in this case that under FIFRA, district court review is available for emergency, *but not for non-emergency*, suspensions even after the opportunity for agency review has been waived. That ruling is both patently erroneous and likely to seriously undermine EPA's ability to prevent illnesses and injuries due to the use of dangerous pesticides.

To understand why that is so, an appreciation of the role of emergency orders, and of administrative and judicial review of such orders, under FIFRA is necessary; we provide that background in Part I, *infra*. As we show in Part II, *infra*, given the structure and purposes of FIFRA generally and of FIFRA's review provisions particularly, the Ninth Circuit's ruling cannot possibly be justified. Indeed, as we show in Part III, *infra*, the court of appeals majority made no attempt whatever to justify its result as consistent with the statutory scheme and purposes as a whole; rather, the court below relied upon a series of syntactical quibbles to explain its result, each of which turn out, even upon a cursory examination, to be plainly incorrect.

By ignoring the overall statutory structure and reducing the inquiry as to reviewability to a semantic one, the court of appeals acted in a manner directly contrary to this Court's recent cases. This case merits this Court's attention not only for that reason but because what is at stake is a statutory provision that is of critical significance on rare but important occasions presented by public health emergencies. Because the Ninth Circuit's opinion will deter EPA from using the emergency powers that Congress granted to the Agency, this Court may not have

another opportunity to restore the EPA's authority to act decisively when the use of pesticides threatens to create a public health emergency before the next such occasion eventuates. To avoid that result and assure that the public health will be protected in the manner Congress, intended, *certiorari* should be granted and the decision of the Ninth Circuit reversed on jurisdictional grounds. Part IV, *infra*.

I. THE STATUTORY SCHEME

a. Under the statutory scheme involved here, Congress provided for three separate, and increasingly decisive, means for the Administrator to deal with pesticide chemicals he has determined may present a threat to human health.

First, whenever there is a "substantial question about the safety of a registered pesticide," the Administrator issues a notice of his intent to cancel its registration or change its classification. *See* FIFRA § 6(b), 7 U.S.C. § 136d(b); *Environmental Defense Fund, Inc. v. EPA*, 510 F.2d 1292, 1296 n.4 (D.C. Cir. 1975) (quoting *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 594 (D.C. Cir. 1971)).

Since such cancellation proceedings may take two years or more to complete, the Administrator may also issue a suspension of the pesticide registration pending the outcome of the cancellation proceedings where to do so "is necessary to prevent an imminent hazard." FIFRA § 6(c)(1), 7 U.S.C. § 136d(c)(1). Such a general "suspension order" must be preceded by notice to the registrants of the pesticide, with appropriate findings, and may not take effect until the registrants (*but not other affected persons*) have been provided an opportunity to request an expedited hearing on whether an imminent hazard exists. *Ibid.*

Finally, in extraordinary circumstances, the Administrator, in order to alleviate a public health emergency,

may issue an "emergency order" immediately suspending the registration of a pesticide and prohibiting its sale, distribution or use, pending the opportunity for an expedited hearing on the existence of an imminent hazard. FIFRA § 6(c)(3), 7 U.S.C. § 136d(c)(3). *See Dow Chemical Co. v. Blum*, 469 F. Supp. 892, 901 (E.D. Mich. (1979) (describing the three stages of pesticide cancellation proceedings as parallel to the three stages (temporary restraining order, preliminary injunction, and final injunction) of court injunctive proceedings).

Precisely because such emergency orders are by definition appropriate only in extraordinary circumstances, an emergency basis has not been invoked often.[8] While sparingly used, the ability of the Administrator to take decisive action in an emergency situation is of vital importance to the overall statutory scheme: Without plenary power to act immediately when necessary to protect the public, the EPA could not fulfill its basic mission "to protect the environment and the public from the misuse of unnecessary and dangerous pesticides." *Dow Chemical Co., supra*, 469 F. Supp. at 900, *quoting* 118 Cong. Rec. 32,259-60 (Sept. 26, 1972).

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[8] As far as petitioners are aware, only in three other instances has EPA found use of certain pesticides so hazardous as to constitute an emergency. The first of the earlier emergencies involved the pesticides 2,4, 5-T and Silvex. See *Dow Chemical Company v. Blum*, 469 F. Supp. 892 (E.D. Mich. 1979) These emergency suspensions were based on the judgment of EPA that pregnant women exposed to these toxic chemicals faced an immediate and unreasonable risk of spontaneous abortions. Both chemicals contained a form of dioxin that produced feto-toxic and teratogenic effects in animals at extremely low doses. An epidemiological study of the spraying of 2,4 5-T also documented spontaneous human abortions in women residing on the Western coast of Oregon. Upon obtaining information about these human abortions, the agency declared a public health emergency and imposed an immediate ban on the substances. *Id.* at 896. *See also*, Fed. Reg. 4452, Feb. 3, 1984 (emergency suspension of ethylene dibromide (EDB)).

b. At the same time, Congress recognized that there may be competing views regarding the danger of some pesticides, as well as pertinent considerations under the statute concerning the impact of banning a pesticide upon agricultural interests. Consequently, Congress carefully crafted FIFRA to provide both for administrative hearings upon the propriety of cancellation and suspension, as described above, and also for *limited* judicial review of various segments of the pesticide cancellation process, to be invoked by different categories of interested parties.

Thus, where the Administrator approves a final cancellation order after a hearing on the order has been held, "any person who will be adversely affected by such order and who has been a party to the [hearing]" may obtain judicial review in an appropriate court of appeals. FIFRA § 16(b), 7 U.S.C. § 136n(b). Similarly, where a hearing on an suspension order has been held, an adversely affected person who was a party to the hearing may, "within sixty days after entry of such order," seek review in a court of appeals, even though cancellation proceedings are still pending. FIFRA § 16(b), 7 U.S.C. § 136n(b); FIFRA § 6(c)(4), 7 U.S.C. § 136d (c)(4). However, "[i]f *no* request for a hearing is submitted to the agency within five days of the registrant's receipt of the notification. . . ., the suspension order may be issued and shall take effect and *shall not be reviewable by a court.*" FIFRA 6(c)(2), 7 U.S.C. § 163d (c)(2) (emphasis added). During the period of any emergency order "entered prior to a hearing," the statute moreover provides for "immediate," but limited, review in a judicial action "by the registrant or other interested person with the concurrence of the registrant in an appropriate district court." FIFRA § 6(c)(4), 7 U.S.C. § 136d(c)(4).

In sum, under the statutory scheme, it is plain that district court review is available to prevent abusive use

of the Administrator's authority to take interim action during a public health emergency, prior to the time a complete administrative hearing on the propriety of the underlying suspension can be held. The question on this case is whether, as the Ninth Circuit held, district court review of emergency orders continues to be available after all registrants have chosen to forego such a hearing on the suspension.

II. THE STATUTORY STRUCTURE AND PURPOSE

Looked at in light of the statutory structure and purposes of FIFRA, the dissenting judge's description of the result reached by the court of appeals on the jurisdictional issue as "bizarre" (App. 41a) is, if anything, charitable. Had this case involved a situation that EPA regarded as constituting an "imminent hazard", but *not* an "emergency", there is no doubt that once the registrants decided to forego a hearing on the suspension of the pesticide, users of the pesticide, such as the plaintiffs in this case, could *not* have challenged the suspension in court, The statute explicitly so states, and consistent with that language, the majority opinion below expressly so read the statute. App. 12a. Moreover, this result would follow even if, as here, agricultural users of the pesticide believed that the costs to them of banning the pesticide while the cancellation proceedings went forward were not adequately taken into account by EPA.

The Ninth Circuit's holding—that district court review is available for emergency, *but not non-emergency*, suspensions even after the opportunity for agency review has been waived—seriously undermines EPA's ability to act decisively when there is a public health emergency caused by a pesticide. Because such emergencies occur rarely but are of critical importance when they do occur, this Court should act now to correct the Ninth Circuit's patent error.

According to the court of appeals majority when, as here, EPA believes the danger posed by a particular

pesticide to be so grave as to constitute not only an "imminent hazard", but an extreme hazard—*viz.*, an "emergency"—a judgment that, as we have noted, EPA to our knowledge has made only three times in the sixteen year history of the statute. (n.8 *supra*), then *both* registrants and users of the pesticide suddenly acquire the right to seek district court review of the suspension *even after the opportunity for an administrative hearing on the validity of the suspension has come and gone.* The effect of this ruling is to confine review of a nonemergency suspension to the expert agency in the first instance, but to permit district court review of an emergency suspension without regard to whether or not available administrative remedies are used.

During the period that administrative review proceedings concerning the validity of the suspension order are still pending, there are critical differences between an emergency and a nonemergency suspension order that justifies district court review of the former. An emergency suspension is already in effect, but there has been *no* opportunity for review of its propriety, administrative *or* judicial; a nonemergency suspension is *only proposed*, and there will be an opportunity for administrative review before the suspension goes into effect. Once the opportnuity for administrative review has been waived, however, those distinctions no longer exists: in both instances, there was a chance for administrative review of the propriety of the suspension order which was waived, and in both instances the suspension order is now in effect.

In other words, providing for judicial review in lieu of administrative review of an emergency but not a nonemergency suspension order while administrative review proceedings are still pending makes sense, precisely because no administrative review is available concerning the propriety of the order *before* the order goes into effect. On that rationale, however, the opportunity for judicial

review should be cut off once the right to administrative review becomes available but is waived. Nowhere in the majority opinion is there any explanation at to why Congress may have wished, instead, to draw a distinction for review purposes—that on its face makes no sense whatsoever—between emergency and nonemergency suspensions. And there are several excellent reasons for regarding such a distinction as one fundamentally at odds with the statutory structure and purpose.

First, the majority opinion below does not face up to the fact that the review language of § 136d(c)(4) upon which the court below relies in terms permits review "by the registrant or other interested person with the concurrence of the registrant." Thus, there is no way to read the statute as permitting nonregistrants, but not registrants, to go to court once administrative remedies have been waived. Rather, it appears that under the Court of Appeals majority opinion, a registrant could intentionally forego administrative review of an emergency suspension and instead seek review in district court.[9]

Thus, the Court of Appeals' reading of the statute is inconsistent with very basic notions of required exhaustion of administrative remedies. *Block, supra*, 467 U.S. at 348. Those notions have particular force where, as here, technically complex issues are at stake, as to which both scientific training and experience in the field are essential to a reasoned decision. *See, e.g.*, Emergency Order, *supra* and Notice of Intent to Cancel *supra*. Here,

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[9] Moreover, even suits not filed by the registrants themselves could be be used by registrants to evade the administrative review process; to paraphrase this Court's observation in parallel circumstances under another stattue:

> [A registrant] would need only to find a [user] who is willing to join in or initiate an action in the district court. The [user] could then raise precisely the same exceptions that the [registrant could] raise administratively. [*Block v. Community Nutrition Institute*, 467 U.S. 340, 348 (1984)].

for example, the district judge, who presumably has no particular knowledge of this area, enjoined the suspension after a hearing lasting two days, less than two weeks after this suit was filed; suspension proceedings, in contrast, typically take several months, and are decided by an entity with both technical expertise and long experience evaluating the benefits and harms of pesticides.

b. Second, with respect to nonregistrants, the preclusion of judicial review is part of a series of considered Congressional decisions giving affected persons other than registrants some rights but not others to contest EPA pesticide decisions.[10] In particular, the statute gives adversely affected *nonregistrants* fewer rights to participate in the decisionmaking process with regard to suspensions than with regard to cancellations: Only registrants can demand a suspension hearing, while any "person adversely affected" by a cancellation notice can request a hearing. 7 U.S.C. § 136d(b) and (c)(1). And when there is an emergency suspension, Congress further limited the participation of nonregistrants in the administrative proceedings to the filing of briefs. 7 U.S.C. § 136d (c)(3). The purpose of the restrictions with regard to suspension hearings is, of course, to limit the availability of administrative review of suspension orders, given the short duration of such orders and the burden on the Agency of conducting both cancellation and suspension

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[10] *See, e.g.*, 7 U.S.C. § 136d(a) ("interested persons" can preclude the automatic cancellation of a pesticide after five years only "with the concurrenec of the registrant"); 7 U.S.C. § 136d(b) (any "person adversely affected" by a proposed cancellation order may request an administrative hearing); 7 U.S.C. § 136d(c)(3) (where an administrative hearing is requested by a registrant upon an emergency suspension order, parties other than the registrant may only participate by filing briefs); 7 U.S.C. § 136n(b) (adversely affected persons may contest EPA orders issued after public hearing, but only if they were parties to the administrative proceedings). *See generally McGill v. Environmental Protection Agency*, 593 F.2d 631 (5th Cir. 1979).

hearings. And, by further restricting nonregistrant participation in emergency suspension hearings, Congress confirmed its belief that, as a general matter, the interests of nonregistrants in suspension (as opposed to cancellation) of a pesticide can be adequately protected by the registrants.

Under the court of appeals majority's reasoning, however, this evident intent to preclude nonregistrants from interfering with the short-term suspension of a pesticide pending cancellation proceedings is fatally compromised. Instead, nonregistrants are given the power (again, for emergency suspensions *only*) of instigating a challenge of the suspension in court, even though the nonregistrants are precluded from instigating such a challenge before the Agency.[11] Yet, after an agency hearing has been waived, the interest of nonregistrants is no different with respect to emergency suspension orders than with respect to suspension orders generally.

c. Third, where the registrants decline to contest the suspension order administratively, the producers of the product have in effect agreed to a suspension of its registration during the period required to review in depth the risks and benefits of the product in order to decide whether its registration should be permanently cancelled. To allow third parties to second-guess that decision is to subject the registrants unwillingly to the possibility of major tort liability for any injuries that may occur while the EPA's initial determination that the product is unsafe

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[11] It is, of course, clear under the statute that affected nonregistrants can seek court review, with the concurrence of a registrant, of emergency suspension orders *until* the suspension proceedings are concluded by waiver or by completion of the hearing process. But that is quite different from giving nonregistrants the power to overturn a suspension in court that has been agreed to by the registrants, even though users are expressly precluded from instigating a challenge to the suspension before the Agency.

as explored in depth.[12] While FIFRA does require the "concurrence of a registrant" before a nonregistrant can bring a district court challenge, the court of appeals' opinion, if upheld, would permit the use of *all* dinoseb products, not only those registered to the concurring registrant. Thus, the court of appeals' result is inconsistent with an evident statutory intent to limit the ability of nonregistrants to interfere with the decision of registrants to withdraw their products from the market temporarily while cancellation proceedings go forward.

d. Fourth, the interest in foreclosing hasty judicial review where the risk is so great in EPA's view as to constitute an "emergency" initially is *stronger* than with respect to a situation in which no such emergency existed, not weaker. In this case, for example, it has been the unaltered conclusion of the Administrator, a conclusion the court of appeals did not question, that continued use of dinoseb represents an unusually serious and immediate hazard. *See* n.2, p. 5, *supra*. Where health risks are of this magnitude, the need to allow an expert agency to act to curb those risks without being second-guessed by a district court is manifest. If those more directly affected, the registrants, contest the risk asessment, or the benefit analysis against which the risk is balanced under the statute, they are free to bring their complaints to the expert agency by pursuing an expedited administrative hearing, reviewable by a court of appeals. Where the

[12] Again, it is true that FIFRA does not permit limited district court review invoked by nonregistrants of emergency suspension orders. But, as we read the statute, that permission is limited to (1) the five day period during which the initial decision of registrants whether to seek a hearing is made (7 U.S.C. § 136d(c)(2)); and (2) the period after at least one registrant has sought a hearing, and the hearing is pending. Where, instead, *all* registrants have already concurred in the conclusion that the Agency has a sufficiently strong case of imminent harm that a suspension should not be challenged, the danger of subjecting unwilling registrants to unwanted liability exposure is greatly heightened.

registrants do not pursue that course, it is presumably because the registrants do not believe they can prevail. To permit court intervention in that circumstance when there could be no such intervention if the emergency were less severe is perverse.

III. THE STATUTORY LANGUAGE

Without discussing at all any of these policy considerations, and while admitting that "EPA's position is not implausible" (App. 15a), the panel majority's opinion nonetheless comes to a contrary result. The basis for so doing is a set of linguistic quibbles with the compelling reading of the statute outlined above. Such a stilted approach to interpreting an intricate statutory scheme is in any event inappropriate; "the judge should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar." Posner, *Statutory Interpretation—In the Classroom and In the Courtroom*, 50 U. Chi. L. Rev. 800, 817 (1983). But in this instance, the fact is that each of the linguistic and grammatical premises upon which the majority below based its anomalous statutory construction is, as a simple matter of language and syntax, patently incorrect.

First, the basic premise below is that this is a case in which "two provisions in the same statute . . . apparently conflict," so that "[i]t is . . . up to the courts to make sense of these apparent inconsistencies." App. 12a. The apparently conflicting provisions, according to the court of appeals majority, are § 6(c)(4) of FIFRA, which permits "*immediate* review" (emphasis supplied) of "[a]ny order of suspension entered prior to a hearing", and § 6(c)(3), providing "[i]f no request for a hearing is submitted . . . within five days . . . the suspension . . . shall not be reviewable by a court."

It is difficult to see what is inconsistent about these provisions: By stressing that review under § 6(c)(4) must be "immediate", and speaking of an order issued "*prior*

to" (not "without") a hearing, Congress limited § 6(c)(4) to prompt review of an emergency order *while an administrative hearing is pending*. Once that hearing is no longer pending because the opportunity has been waived, any review sought is neither "immediate" nor, it turns out, will any resulting order be entered "prior to" a hearing.

Second, the court of appeals maintained that the prohibition in § 6(c)(2) upon review of suspension orders where no administrative hearing was sought cannot apply to an emergency suspension order because the statute "provides for issuance of a *final* suspension order only in those cases where there is an administrative hearing," (emphasis supplied), so that "when no hearing is held, the emergency suspension order simply stays in effect until the cancellation . . . proceedings are completed." App. 13a. But the portion of § 6(c)(2), incorporated in § 6(c)(3), that precludes judicial review if no hearing is requested does not refer to any special form of suspension order termed a "final" suspension order. Rather, the provision states only that "[i]f no request for a hearing is submitted to the Agency within five days of the registrant's receipt of the notification provided for by paragraph (1), *the suspension order* . . . shall not be reviewable by a court." (Emphasis supplied). Nor is there any provision in FIFRA for issuing a 'final" suspension order for a *non*emergency suspension where no hearing is requested. Thus, the linguistic dichotomy the majority sought to draw between emergency suspension orders in which hearings are waived but no "final" order issues, and nonemergency orders in which hearings are waived and there is a "final" order, simply does not exist in the statute itself.[13]

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[13] Moreover, it is implausible in any event that Congress would intend reviewability to depend upon whether EPA issues a separate paper denominated a "final" suspension order or, instead, as here, simply announced that the previously issued suspension order had become final.

Moreover, the court of appeals majority maintained that § 6(c)(3) cannot incorporate the part of § 6(c)(2) that precludes review because the sentence in which that preclusion occurs provides that if no hearing is requested "the suspension order may be issued and shall take effect *and* shall not be reviewable by a court" (emphasis supplied); because an emergency suspension order has already issued and taken effect, said the majority below, the *entire sentence* in which the review preclusion occurs must not be applicable to emergency orders. App. 14a. But the three clauses of the quoted sentence are joined by conjunctions, and are conceptually independent. And § 6(c)(3) in terms makes *all* of § 6(c)(2) applicable to emergency orders, with the exception, *inter alia*, of the first two clauses of the quoted sentence of § 6(c)(2), *but not the third.* ("[P]aragraph (2) shall apply except that (1) the order of suspension shall be in effect pending [the suspension hearing]". . . .) Thus, while some parts of § 6(c)(2) are inapplicable to § 6(c)(3) orders, there is no basis for reading out of the statute those conceptually and grammatically separate directives that are *not* inapplicable just because they appear in the same sentence as the inapplicable provisions.

Further, the court of appeals majority rejected the position we urge here because, while § 6(c)(4) provides that the district court action "*may* be maintained simultaneously with any administrative review proceeding under this section" (emphasis supplied), our position *requires* that judicial and administrative review be pursued simultaneously. App. 15a. But that is certainly not our position: Obviously, interested parties are free, under our construction of the statute, to pursue administrative remedies only. Moreover, the most natural reading of the quoted sentence is only to make clear that the mere pendency of judicial review should not stay, even temporarily, the administrative proceedings from going forward simultaneously.

Finally, the fact the § 6(c)(4) "authorizes the district court to enter a stay of the order 'pending the Administrator's final decision with respect to cancellation or change in classification,'" (App. 14a), does not indicate that the district court's review authority over emergency orders persists until the cancellation proceedings are complete. The court of appeals majority failed to recognize that § 6(c)(4) contains *two* different review provisions: The first sentence of the section pertains to review in the court of appeals of suspension order issued *after* hearing, while the second sentence pertains to review in the district court of orders issued *prior* to a hearing. The relief sentence is the third sentence in the section, and, it would appear, applies to *both* of the preceding sentences.

As to review of a suspension hearing by the court of appeals after a full hearing, providing that "'[t]he effect of any order of the court will be only to stay the effectiveness of the suspension order, pending a hearing before the Administrator'" (App. 14a-15a, *quoting* S. Rep. No. 838, 92d Cong., 2d Sess.) would have been entirely inappropriate. By allowing for the possibility of a broader order, but stating the provision in terms of limitation ("[t]he effect of any order will be *only* to stay the effectiveness of the suspension order, pending the Administrator's final decision with respect to cancellation or change in classification" (emphasis supplied)), Congress was simply making clear that under the proper circumstances—that is, where the suspension order was issued after hearing—the stay could extend until the end of the cancellation proceedings; Congress was *not* directing courts always to issue such broad orders where not called for in a particular case. *Cf. Hecht Co. v. Bowles*, 321 U.S. 321 (1944).

IV. THE IMPORTANCE OF THIS CASE

This Court has explained that in determining whether a particular statute precludes judicial review of agency

action at the behest of certain parties, "unambiguous proof, in the traditional evidentiary sense, of a congressional intent to preclude judicial review at [the particular plaintiff's] behest" is unnecessary. *Block v. Community Nutrition Institute, supra,* 467 U.S. at 351. Rather, "[t]he presumption favoring judicial review of administrative action is just that—a presumption" and "may be overcome by [*inter alia*] specific language or . . . inferences of intent drawn from the statutory scheme as a whole." *Id.* at 349. *See also United States v. Fausto,* —— U.S. ——, 108 S.Ct. 668, 671-75 (1988).

In concluding that Congress intended to allow judicial review of emergency suspension orders under FIFRA even when the right to an administrative hearing on the order was waived, the court of appeals majority gave lip service to this Court's *Block* opinion (App. 16a), but did not in fact follow the "balanced approach to statutory construction" mandated by this Court in *Block. See* 467 U.S. at 350; *see also Morris v. Gressette,* 432 U.S. 491 (1977). Instead, the Ninth Circuit proceeded to search for a "*clear* command of the statute" (App. 16a), and in so doing placed its entire reliance on a series of sterile grammatical points. Nowhere did the majority below attempt to fit its conclusions into the statutory scheme as a whole, or explain why Congres would conceivably devise a system of review such as the one created by the opinion below. Thus, the court of appeals approach is in clear conflict with this Court's pronouncements concerning the reviewability of administrative decisions, and merits this Court's attention for that reason alone.

Further, as we have demonstrated (Part III, *supra*), by failing to factor in at all the statutory structure or purposes, as this Court's precedents command, the Court of Appeals majority attributed to Congress an absurd intent likely to undermine the ability of EPA to act decisively where health emergencies exist. If the decision of the majority below is left intact, then the EPA Administrator

will be severely deterred from exercising his emergency suspension authority in the future. To do so would subject the agency to the possibility of simultaneous suits before several of the hundreds of district court judges, none of whom have the accumulated technical knowledge and expertise of the Agency itself, in lieu of the single administrative hearing provided for by the statute.

The likely administrative response to that possibility will be to allow the use of pesticides while the opportunity for a suspension hearing is pending, in the perfectly rational belief that under the court of appeals' holding, the pesticide may be removed from the market *more expeditiously* if *no* emergency order is issued than if an emergency order is involved. But the price of such a response will be to allow the use of, and exposure to, extremely dangerous substances to continue while statutory procedures are exhausted, a price that Congress explicitly intended to eliminate by creating the emergency order option in the first place.

Thus, the effect of the present case promises to be to inhibit the Agency from using its emergency powers at all.[14] Consequently, given the importance of the issue and the chilling effect on the use of EPA's power to prevent an imminent health hazard, the Ninth Circuit's patent error should be corrected by this Court now, before the next pesticide emergency arises.

CONCLUSION

For the reasons stated above, this Court should grant *certiorari* and reverse the judgment of the court of appeals.

Respectfully submitted,

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[14] In the only other case concerning the issue presented here, the district court expressly rejected the conclusion of the district court in this case, and there was no appeal. *Nagel v. Thomas*, 666 F. Supp. 1002 (W.D. Mich. 1987). In addition, the general view of the emergency order provision taken in *Dow Chemical Co., supra*, is inconsistent with the decision below.